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No. 85-359

In The

Supreme Court of the United States

October Term, 1985

COUNTY OF WAYNE and WILLIAM LUCAS,

Petitioners,

vs.

SALVATORE MARCHESE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN D. O'HAIR
Wayne County Corporation Counsel

GLEN HOWARD DOWNS
Assistant Corporation Counsel
701 City-County Building
Detroit, Michigan 48226
Phone: (313) 224-5030

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED FOR REVIEW

1. IN VIEW OF THIS COURT'S DECISIONS IN *OKLAHOMA CITY V. TUTTLE* AND *CITY OF SHEPARDSVILLE V. RYMER,* DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT AN ISOLATED INSTANCE OF PRISONER ABUSE BY COUNTY SHERIFF'S DEPUTIES ESTABLISHED "OFFICIAL POLICIES" OF INAPPROPRIATE TRAINING AND DISCIPLINE OF SHERIFF'S DEPUTIES SUFFICIENT TO RENDER BOTH THE SHERIFF AND THE COUNTY LIABLE FOR DAMAGES UNDER 42 U.S.C. § 1983?

2. ABSENT EVIDENCE THAT THE SHERIFF OR POLICYMAKING OFFICIALS WITH THE SHERIFF'S OFFICE APPROVED OR EVER KNEW OF AN ISOLATED INSTANCE OF PRISONER ABUSE, WOULD THEIR FAILURE TO INVESTIGATE THAT INCIDENT AND TAKE DISCIPLINARY ACTION SUFFICE TO ESTABLISH AN "OFFICIAL POLICY" OF RATIFYING OR ACQUIESCING IN SUCH ABUSE, THUS RENDERING BOTH THE SHERIFF AND COUNTY LIABLE FOR DAMAGES UNDER 42 U.S.C. § 1983?

3. DOES *BRANDON V. HOLT* COMPEL IMPOSING LIABILITY ON A MICHIGAN COUNTY FOR THE OFFICIAL ACTS OF ITS ELECTED SHERIFF, NOTWITHSTANDING THAT UNDER STATE LAW THERE IS NO AGENCY-LIKE RELATIONSHIP BETWEEN THE COUNTY AND THE SHERIFF AND THAT THE UNITED STATES CONGRESS APPROVED MICHIGAN COUNTIES' IMMUNITY TO LIABILITY FOR THOSE ACTS IN THE MICHIGAN CONSTITUTION?

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COUNTY OF WAYNE and WILLIAM LUCAS,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

The Petitioners, through counsel JOHN D. O'HAIR, Wayne County Corporation Counsel, and GLEN HOWARD DOWNS, Assistant Wayne County Corporation Counsel, respectfully pray this Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this action on April 3, 1985, as amended by its Order entered July 3, 1985, denying Petitioners' petition for rehearing en banc.

OPINIONS BELOW

The Court of Appeals opinion that issued on April 3, 1985, is reported as *Marchese v. Lucas,* 758 F.2d 181 (6th Cir. 1985), and is reproduced in the Appendix to this Petition, pp. 1a through 18a.[1]

The prior Order of Judgment dated May 26, 1982, and entered in the United States District Court for the Eastern District of Michigan, Southern Division, is unpublished and is reprinted in the Appendix to this Petition, pp. 19a-20a.

The Court of Appeals Order entered July 3, 1985, amending the earlier-issued opinion and denying Petitioner's petition for rehearing en banc also is unpublished and is reprinted in the Appendix to this Petition, pp. 21a-22a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered April 3, 1985. The Court of Appeal's Order amending the opinion and judgment and denying Petitioners' petition for rehearing en banc was entered July 3, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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1. All of the parties to the proceedings in the Court of Appeals are named in the caption of this Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Mich. Const. art. VII, § 4 (1835) provided in its entirety:

> "There shall be a sheriff, a county treasurer, and one or more coroners, a register of deeds and a county surveyor, chosen by the electors in each of the several counties once in every two years, and as often as vacancies shall happen. The sheriff shall hold no other office, and shall not be capable of holding the office of sheriff longer than four in any term of six years; he may be required by law to renew his security from time to time, and in default of giving such security, his office shall be deemed vacant; but *the county shall never be made responsible for the acts of the sheriff.*" [emphasis added]

Mich. Const. art. VII, § 4 (1963) now provides in its entirety:

> "There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be provided by law. The board of supervisors in any county may combine the offices of county clerk and register of deeds in one office or separate the same at pleasure.

Mich. Const. art. VII, § 6 (1963) now provides in its entirety:

> "The sheriff may be required by law to renew his security periodically and in default of giving such security, his office shall be vacant. *The county shall never be responsible for his acts,* except that the board of supervisors may protect him against claims by prisoners for unintentional injuries received while in his custody. He shall not hold any other office except in civil defense. [emphasis added]

Three statutes are in this Petition, the first being in the act that admitted the state of Michigan into the Union, Act of June 15, 1836, 5 Stat. 49, § 2. The statutory section is too long to set out here, and is reprinted in the Appendix to this Petition, p. 23a.

The second statute is the federal Rules of Decision Act, 28 U.S.C. § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The third statute is 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

This is a civil rights action brought by Respondent Salvatore Marchese, a naturalized Canadian, in the United States District Court for the Eastern District of Michigan under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343(2) and (4)

(civil rights violations) and 1332(a) (2) (diversity of citizenship), alleging Wayne County Sheriff's deputies had assaulted him while he was in their custody. Respondent predicated his federal claim against petitioners County of Wayne and William Lucas (sued both in his individual capacity and in his official capacity as Wayne County Sheriff) on their alleged failure to train and supervise sheriff's deputies on handling and protecting prisoners, and on their alleged failure to investigate the assault and discipline the deputies involved.

The case was tried to a jury, who returned a general verdict (1) in favor of petitioner Lucas individually and in favor of deputies Sieminski and Alcorn, two sheriff's deputies also named parties defendant, but (2) against petitioners County of Wayne and Lucas in his official capacity in the amount of $125,000. The Petitioners appealed, and the Court of Appeals affirmed.

The action arose in May, 1976, following the Respondent's arrest in a suburban Detroit park by Wayne County Sheriff's deputies. When Respondent, a narcotics addict, was being arrested, he grabbed a pistol kept under the front seat of his car and tried to shoot the arresting officer. Following a struggle over the gun, the arresting officer finally subdued the Respondent with the help of a passerby, summoned assistance, and assisted by Deputy Sieminski transported the Respondent to a nearby sheriff's road patrol station. Viewing the evidence in the light favorable to Respondent, he was frightened at the road patrol station by a group of sheriff's deputies who were angered by Respondent's attempt on their fellow deputy's life, and Respondent tried to escape. He

was recaptured during the ensuing melee and, he claims, beaten by deputies Sieminski and Alcorn as he was taken into the road patrol station. Respondent testified that later that evening, while he was in his cell at the road patrol station, a sheriff's deputy (who was never identified in this action) opened Respondent's cell, and that he was then assaulted by another individual (also never further identified). Respondent commenced this action while in prison in Michigan, serving his sentence on his conviction for felonious assault.

After reviewing the "undisciplined conduct" of the sheriff's deputies during this incident, the Court of Appeals concluded such conduct "speaks ab initio of lack of training and discipline." (Opinion at Appendix, p. 15a). The evidence was that Sheriff's deputies received the 270 hours of training required by Michigan law for police officers. Yet, the Court of Appeals also concluded there had been "a failure to provide a trained and disciplined county law enforcement agency" (Appendix, p. 16a), again generalizing from both the details of this incident and, later (see order denying rehearing at Appendix, p. 21a), from the testimony of deputies Sieminski, Alcorn, and a road patrol station line supervisor, Sergeant Robinson, that "at the time of the incidents in question, they had not received any training in the care, treatment, and handling of prisoners in their custody." The Court of Appeals "conclud[ed] from these facts * * * that the 'official policy' of the sheriff and the County of Wayne as represented by him in police matters, 1) had not required appropriate training and discipline of his officers * * * *." (Appendix, p. 16a).

The Court of Appeals also "conclud[ed] from these facts" that the Petitioners have a second "official policy", that "where a citizen had made a life-threatening gesture by pointing a gun at a sheriff's deputy, subsequent assault by brother officers, upon a prisoner, would not engender either serious investigation to discover the perpetrators or official sanctions against their conduct." (Appendix, p. 16a). The supporting "facts", like the policy itself (i.e., the supposition of complicity of patrol station officers in the assault on Respondent and in an ensuing "cover-up" (Appendix, p. 15a); the absence of evidence that the Petitioner Sheriff did or did not conduct a "meaningful investigation" or identify and discipline those responsible (Appendix, pp. 8a,15a)) again appear only indirectly as inferences from the record of this isolated incident, and not by direct evidence

It was the latter "official policy" that the Court of Appeals "also regard[ed] as *ratification* of the illegal acts of the unidentified officers * * * *" (Appendix, p. 16a) (emphasis added).

And then both "official policies" as well as the "ratification" were imputed to Petitioner County of Wayne, because the Court of Appeals deemed its relationship with the Petitioner Sheriff "so close". (Appendix, p. 17a).

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REASONS FOR ALLOWING THE WRIT

By predicating the Petitioners' liability on their various "official policies" gleaned entirely by inference from this one, isolated instance of prisoner abuse, the Court

of Appeals countenanced both proof of those policies and proof they caused the incident in conflict with this Court's decision in *Oklahoma City v. Tuttle,* — U.S. —, 105 S.Ct. 2247, 85 L.Ed.2d 791 (1985), and contrary its own precedent in *Pembauer v. City of Cincinnati,* 746 F.2d 337, 341 (6th Cir. 1984) *cert. granted* 53 U.S.L.W. 3877 (U.S. June 17, 1985) (No. 84-1160).

In affirming the judgment against Petitioner Lucas in his official capacity as Sheriff, absent any showing whatever that he either encouraged this incident of misconduct by his deputies or in some other way directly participated in it, the Court of Appeals' decision conflicts with this Court's decisions in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (precluding respondeat superior liability), *Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), and *Oklahoma City v. Tuttle,* among others; and is contrary to its own earlier decision in *Hays v. Jefferson County,* 668 F.2d 869, 872 (6th Cir. 1982).

Moreover, in an earlier case from the Sixth Judicial Circuit that complemented this one by holding that an official "custom" under *Monell* may be established by proof of a single isolated incident of police misconduct, this Court granted the municipality's petition for a writ of certiorari and summarily vacated the Court of Appeals' judgment and remanded the case for reconsideration in light of *Oklahoma City v. Tuttle.* See *Rymer v. Davis,* 754 F.2d 198, 200-201 (6th Cir. 1985) *vacated and remanded sub nom. City of Shepardsville v. Rymer,* 53 U.S.L.W. 3903 (U.S. July 1, 1985) (No. 84-1756). Also pending in this Court is yet another Sixth Circuit case

presenting a similar issue of whether an official county policy can be established from a single, discrete decision of an elected county prosecutor. *Pembauer v. City of Cincinnati, supra.*

The Court of Appeals, misreading *Brandon v. Holt,* — U.S. —, 105 S.Ct. 873, 83 L.Ed. 2d 878 (1985) to impose upon county government liability for the policies of non-county officials over whom the county has no control, (1) usurped as a federal question the State of Michigan's prerogative to fix the distribution of local policy-making powers among its counties and local sheriffs, contrary to the principles of federalism affirmed in this Court's decisions in *Forsyth v. City of Hammond,* 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897) and *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835 (1937), among others; and then (2) fashioned a new county liability for the policies of county sheriffs, in conflict with a decision in the Fourth Judicial Circuit on the issue, see: *Allen v. Fidelity & Deposit Co. of Maryland,* 515 F. Supp. 1185, 1189-1191 (D.S.C. 1981) *aff'd mem.* 694 F.2d 716 (4th Cir. 1982), and contrary to both the express provision in the Constitution of the State of Michigan precluding that liability and to the pertinent decisions of the Michigan Supreme Court. See: Mich. Const. art. VII, § 6 (1963) and *Lockaby v. County of Wayne,* 406 Mich 65, 77, 276 NW2d 1, 3 (1979), respectively.

The Petitioners respectfully suggest, based on the foregoing, that in this action the Sixth Circuit Court of Appeals "has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; * * * [and] has decided a federal question in a way in conflict with applicable decisions of this Court."

Sup. Ct. R. 17.1(a) & (c). Further, the Court of Appeals' decision ascribing the Petitioner Sheriff's policy-making powers to Petitioner County of Wayne conflicts with the applicable state laws and decisions in Michigan, and is reviewable by this Court under the principles affirmed in *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940).

UNDER *OKLAHOMA CITY V. TUTTLE* AND *CITY OF SHEPARDSVILLE V. RYMER*, THE COURT OF APPEALS ERRED BY PREDICATING PETITIONERS' LIABILITY UNDER 42 U.S.C. § 1983 ON "OFFICIAL POLICIES" PROVED SOLELY BY INFERENCES WRENCHED FROM AN ISOLATED INSTANCE OF MISCONDUCT BY NON-POLICYMAKING COUNTY SHERIFF'S DEPUTIES.

This is the second Sixth Circuit case to adopt the view in *Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979) that the liability of public officials and local governments under 42 U.S.C. § 1983 may be predicated on proof of an isolated instance of unconstitutional conduct by local law enforcement officers. The first case was *Rymer v. Davis*, 754 F.2d 198 (6th Cir. 1985) *vacated and remanded sub nom. City of Shepardsville v. Rymer*, 53 U.S.L.W. 3903 (U.S. July 1, 1985) (No. 84-1756), which held a municipal "custom" (of failing to adequately train local police officers and of official acquiescence in police misconduct) within the "policy or custom" requirement under *Monell v. Department of Social Services*, can be proved through "only a single brutal incident of police misconduct". *Rymer v. Davis*, 754 F.2d at 201. This case is the sequel to *Rymer* in that it holds that *Monell's* "policy" requirement also can be met on proof of a similar isolated episode

of police misconduct. The rule is not set out in so many words in the Court of Appeals' opinion, but it has been clear throughout the case (note, for instance, the since-condemned jury instruction[2] and the absence of any reference whatever in the Court of Appeals' opinion to evidence of prior similar acts or patterns of conduct) that proof *vel non* of the requisite "official policies" must be gleaned from the circumstances of this isolated incident.

The common question in this Petition's first two Questions Presented for Review is whether official or governmental liability under 42 U.S.C. § 1983—be it through the "official policies" set out earlier or through the theory that unconstitutional conduct was "ratified" or acquiesced in—may be established entirely on proof of a single, isolated instance of unconstitutional conduct by nonpolicy-making police officers. On that question, this Court's decision in *Oklahoma City v. Tuttle* is decisive: The answer is "No!" Repudiating the single-incident exception alluded to in *Owens v. Haas,* and crystallizing the single or isolated incident rule that had been gaining ever-increasing recognition over the past several years in the

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2. The District Court jury was instructed, in part:

> "Generally, an *isolated incident* of police misconduct is not sufficient to hold the Sheriff liable under the Civil Rights Law. However, where there is an unusually brutal conduct on the part of the deputies, you may find that a *single isolated incident is sufficient* to hold the Sheriff liable under the Civil Rights Law." [emphasis added]

The instruction in substance is the same as the one this Court repudiated in *Oklahoma City v. Tuttle,* 105 S.Ct. at 2431.

federal Courts of Appeals[3] (even in the Sixth Circuit until these last two cases; see *Pembauer v. City of Cincinnati*,

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3. A survey of just the federal Courts of Appeals shows the wide-spread recognition of the "isolated occasion" rule, that proof of a single or isolated incident of unconstitutional conduct is not enough to establish the liability of public officials or governmental bodies under *Monell:*

First Circuit: *Landrigan v. City of Warwick*, 628 F.2d 736, 747 (1st Cir. 1980)

Second Circuit: *Turpin v. Mailet*, 619 F.2d 196, 202 (2d Cir. 1980)

Third Circuit: *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 51 (3d Cir. 1985)

Fourth Circuit: *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983); *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir. 1981); *Orpiano v. Johnson*, 632 F.2d 1096, 1101 (4th Cir. 1980); *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir. 1980)

Fifth Circuit: *Craine v. Alexander*, 756 F.2d 1070, 1073 (5th Cir. 1985); *Webster v. City of Houston*, 735 F.2d 838, 842, 851 (5th Cir. 1984); *Bennett v. City of Slidell*, 728 F.2d 762, 768 n 3 (5th Cir. 1984) (en banc); *Languirand v. Hayden*, 717 F.2d 220, 225, 227-228 (5th Cir. 1983); *Lopez v. City of Austin*, 710 F.2d 196, 198 (5th Cir. 1983); *Berry v. McLemore*, 670 F.2d 30, 32 (5th Cir. 1982); *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1323 (5th Cir. 1980); *Marrero v. City of Hialeah*, 625 F.2d 499, 512 (5th Cir. 1980)

Sixth Circuit: *Pembauer v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984)

Seventh Circuit: *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1355-1356 (7th Cir. 1985); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1272 (7th Cir. 1984); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128-129 (7th Cir. 1982); *Powe v. City of Chicago*, 664 F.2d 639, 650 (1981)

Eighth Circuit: *Munz v. Parr*, 758 F.2d 1254, 1259 (8th Cir. 1985); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984); *Baker v. McCoy*, 739 F.2d 381, 384-385 (8th Cir. 1984); *Jennings v. Davis*, 476 F.2d 1271, 1275 (8th Cir. 1973)

(Continued on next page)

746 F.2d at 341), this Court concluded in *Tuttle*, 105 S.Ct. at 2436:

> "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. * * * But where the policy relied upon is not itself unconstitutional [e.g., 'inadequate training,' *id.* at 2436 n.7], *considerably more proof than the single incident will be necessary in every case* to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." [emphasis added]

To iterate: Nothing in this record or in the Court of Appeals' opinion, aside from the generalizations from this isolated incident, bears on the existence of Petitioners' supposed "official policies", or on either the "requisite fault" or the "causal connection between the 'policy' and the constitutional deprivation." Under the principles affirmed in *Tuttle* and in *City of Shepardsville v. Rymer*, the Court of Appeals' determination that those policies had been proved should be reversed.

The Court of Appeals also predicated the Petitioner Sheriff's liability on his "ratification of the illegal acts

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(Continued from previous page)

Ninth Circuit: Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-681 (9th Cir. 1984); *Hirst v. Gertzen*, 676 F.2d 1252, 1263 (9th Cir. 1982)

Tenth Circuit: Cowdery v. City of Eastborough, 730 F.2d 1376, 1379 (10th Cir. 1984); *McClelland v. Facteau*, 610 F.2d 693, 697 (10th Cir. 1979)

Eleventh Circuit: Gilmere v. City of Atlanta, 737 F.2d 894, 904 (11th Cir. 1984)

of the unidentified officers" (Appendix, p. 16a), accomplished through his "official policy" of neither investigating incidents like this one nor disciplining the perpetrators (Appendix, p. 16a). Again, there is no evidence whatever of any prior failure of the Sheriff to promptly investigate incidents of prisoner abuse and discipline those responsible for it. (Indeed, the direct evidence, which the Court of Appeals' opinion omits, is to the contrary, that the Sheriff's Internal Security Bureau investigates complaints of prisoner abuse and officer misconduct (there was no evidence at trial Respondent ever made such a complaint), and that officers who use excessive force or abuse prisoners are both disciplined and criminally prosecuted by the Sheriff himself.) There was no evidence that those charged with abusing Respondent had ever engaged in such conduct before. In short, this "official policy"-cum-"ratification" theory employed by the Court of Appeals fares no better under *Tuttle* than the "official policies" on inadequate training.

The final point under *Tuttle* and on the Court of Appeals' "ratification" theory is that there is no evidence whatever that either the Sheriff or anyone with a policy-making role in his office ever approved or even knew about this incident. Thus, in addition to repudiating the "single incident" rule acknowledged earlier in *Pembauer v. City of Cincinnati,* the Sixth Circuit also repudiated in this case its earlier adherence to *Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) in *Hays v. Jefferson County,* 668 F.2d 869, 874 (6th Cir. 1982):

> "The result of *Rizzo* * * * is that a failure of a supervisory official to supervise, control, or train the offending officers is not actionable absent a showing

> that the official either encouraged the specific incident of misconduct or in some other way *directly participated* in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." [emphasis added]

Unable to link the Petitioner Sheriff to this incident by any evidence whatever that he "at least implicitly authorized, approved, or knowingly acquiesced" in it, the Court of Appeals held it was enough that "he had a duty to know and act." (Appendix, p. 16a). With all respect, that duty could not in law or fact be "the moving force of the constitutional violation", *Monell,* 436 U.S. at 694; and see *Tuttle,* 105 S.Ct. at 2434, nor could its breach in the absence of any knowledge of this incident play an "affirmative part in depriving [Respondent] of any constitutional rights." *Rizzo,* 423 U.S. at 377.

BRANDON V. HOLT DOES NOT COMPEL THE LIABILITY OF A MICHIGAN COUNTY SHERIFF TO BE IMPOSED ON THE COUNTY HE SERVES, AND THE COURT OF APPEALS' JUDGMENT DOING SO VIOLATES THIS COURT'S PRECEPTS OF FEDERALISM AS WELL AS THE CONGRESSIONALLY APPROVED GRANT OF COUNTY IMMUNITY TO THAT LIABILITY IN THE MICHIGAN CONSTITUTION.

The "official policies" the Court of Appeals formulated are not attributed to Petitioner County of Wayne. Rather, they are attributed to the Petitioner Sheriff, and through him foisted onto Wayne County because "the relationship between the County and the Sheriff's Depart-

ment [sic] is so close". (Appendix, p. 17a) The opinion further considers the County's liability for the Sheriff's policies to be "consistent with and indeed compelled by the U.S. Supreme Court's decision in *Brandon v. Holt,* * * * *." (Appendix, p. 17a). The Court of Appeals thus doubly erred: it misapprehended the relation between the County of Wayne and the Sheriff, and then misapplied *Brandon v. Holt.*

As for *Brandon v. Holt:* This Court held (so far as pertinent here) that "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." *Id.,* 105 S. Ct. at 878. As this Court explained, *id.* at 876, the rationale for the rule is that an action against a municipal official in his official capacity is "tantamount" to bringing the action against the municipality itself in that "official capacity suits generally represent an action against an entity of which an officer is an *agent* * * * *" (emphasis added). *Id.* at 877 *quoting Monell v. Department of Social Services,* 436 U.S. at 690 n. 55.

That is not the relationship between the County of Wayne and the Sheriff. Notwithstanding the panel opinion's characterization of that relationship as "close", this Court has long held that federal courts have no authority to fix the powers and relationships of state-created governmental entities. *Forsyth v. City of Hammond,* 166 U.S. 506 (1897); *Highland Farms Dairy v. Agnew,* 300 U.S. 608 (1937). This Court in *Forsyth,* quoting *Claiborne Co. v. Brooks,* 111 U.S. 400 (1884), explained that:

> "It is undoubtedly a question of local policy with each state what shall be the extent and character of the

> powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state."
>
> *Forsyth,* 166 U.S. at 519.

Likewise, the *Highland Farms* majority held that, "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." 300 U.S. at 612. The same precept is embodied in the federal Rules of Decision Act, 28 U.S.C. § 1652, set out earlier. Accordingly, the Court of Appeals was bound to defer to state law in determining the relationship between Petitioners and in ascertaining their respective powers and liabilities.

The law in Michigan is clear that a county sheriff is not a county official in the sense of being an instrumentality of county governmental power. Rather, the sheriff holds a distinct constitutional office provided for in Mich. Const. art. VII, § 4 (1963) set out earlier, and the sheriff's duties and powers are not prescribed by the county, but by state statute—which sets them out in considerable detail. 1975-1976 Mich. Att'y. Gen. Biennial Rep. 369; *Capitol City Lodge No. 141 v. Meridian Township,* 90 Mich App. 533, 541, 282 NW2d 383 (1979). The sheriff's independence from county control accords with the relationship between county sheriffs and their respective counties that the Michigan Constitution intended to effect:

> "As to the so-called constitutional officers, they do not in any important respect carry out policy developed within the county. Their duties are determined by the state legislature and their time is almost com-

> pletely devoted to carrying out those statutory duties. Not only so, but they are supervised by the state in those activities. The sheriff and the prosecuting attorney, as law enforcement officers, are under the direction and supervision of the Attorney General and of the Governor himself. * * *"

1 Official Record, State of Michigan Constitutional Convention 1961, p. 1092 (remarks of Arthur Elliott).

In view of the mutual independence in Michigan of county sheriff's and the counties they serve, it is settled in Michigan that a county has no power to interfere with the Sheriff's statutory authority, *see:* 1977-1978 Mich. Att'y. Gen. Biennial Rep. 427, 428; or make "policy in police matters" (to use the Court of Appeals' term, Appendix, p. 17a) or even organize a county police force. *Id.* On the other hand, in connection with § 1983 liability for the acts of deputy sheriff's, Michigan federal District Courts conclude that given the relationship between sheriffs and counties, " 'the sheriff, not the county, establishes the policies and customs described in *Monell,*' and that therefore the County could not be liable for civil rights violations by sheriff's deputies." *Lopez v. Ruhl,* 584 F. Supp. 639, 649 (W.D. Mich. 1984) *quoting in part Kroes v. Smith,* 540 F. Supp. 1295, 1298 (E.D. Mich. 1982). The rule in *Lopez* and *Kroes* is like that in other federal Judicial Circuits—notably the fourth, see: *Allen v. Fidelity & Deposit Co. of Maryland,* 515 F. Supp. 1185, 1189-1191 (D.S.C. 1981) *aff'd mem.* 694 F.2d 716 (4th Cir. 1982); *Miller v. Anderson,* 594 F. Supp. 640, 643 (N.D. W.Va. 1984), that where the county has no power to control its elected county sheriff, the county is not liable on the sheriff's "policies or customs" that violate constitutional rights. Observance of the relationship established by Michigan

law between Michigan counties and their respective sheriffs would, under the principles of federalism just reviewed, preclude imposing liability on Petitioner County of Wayne for its sheriff's law enforcement "policy or customs." *Brandon v. Holt* does not nullify those principles of federalism, and so compels no different result.

Not only does the County's and the Sheriff's independence immunize the former to liability for the policies of the latter, that immunity was expressly approved by Congress upon Michigan's admission to the Union in 1836, and has been in the Michigan Constitution ever since. The provision in Mich. Const. art. VII § 4 (1835) that "the county shall never be made responsible for the acts of the sheriff" was set out earlier, and the Congressional act approving that immunity provision, *see* Act of June 15, 1836, 5 Stat. 49, § 2, is set out in the Appendix. That immunity provision *still* is in the Michigan Constitution. See Mich. Const. art. VII, § 6 (1963), also set out earlier. The Petitioners respectfully suggest that inasmuch as the County's state constitutional immunity to liability for its Sheriff's policies bears the imprimatur of Congress, it is of equal dignity with 42 U.S.C. § 1983, the statute upon which the Sheriff's liability is predicated. The Petitioner County of Wayne should be accorded the immunity that the constitution, with Congressional approval, granted it.

———o———

CONCLUSION

For the reasons stated, the Petitioners respectfully request this Court to issue its writ of certiorari to the Court of Appeals for the Sixth Circuit and thereupon reverse the judgment entered herein, or alternatively, as in *City of Shepardsville v. Rymer,* summarily vacate the judgment and remand this case for reconsideration under the principles affirmed in *Oklahoma City v. Tuttle.*

Respectfully submitted,

JOHN D. O'HAIR
Wayne County Corporation Counsel

GLEN HOWARD DOWNS (P 36540)
Assistant Corporation Counsel
701 City-County Building
Detroit, Michigan 48226
Phone: (313) 224-5030

Counsel for Petitioners

DATED: August 29, 1985.

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-1001

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SALVATORE MARCHESE,
Plaintiff-Appellee,

v.

WILLIAM LUCAS, Individually and as Sheriff of Wayne County, Michigan, and THE COUNTY OF WAYNE, Jointly and severally,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed April 3, 1985

Before: EDWARDS* and KRUPANSKY, Circuit Judges; and PECK, Senior Circuit Judge.

EDWARDS, Circuit Judge. This is an appeal from a judgment for $125,000 entered in the United States District Court for the Eastern District of Michigan, Judge Julian A. Cook, Jr., presiding, based upon a jury verdict in favor of plaintiff Marchese against William Lucas in his official capacity as Sheriff of Wayne County, and against the County of Wayne. The

* Honorable George Edwards took senior status January 15, 1985.

suit was based upon 42 U.S.C. § 1983. The cases in the United States Supreme Court which appear to establish decisional principles on the issues of this case are *Monell* v. *Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978) and *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Directly applicable to this case is a very recent decision in *Brandon* v. *Holt*, 105 S. Ct. 873 (1985). *See also*: *Black* v. *Stevens*, 662 F.2d 181, 191 (3rd Cir. 1981), and *Leite* v. *City of Providence*, 463 F.Supp. 585, 590-91 (D. R.I. 1978).

The first issue presented by this case is whether or not § 1983 creates an action for damages on the part of a prisoner lawfully arrested and in custody when, as this jury found on substantial evidence, he was twice beaten severely while in the custody and complete control of sheriff's officers. The second important question is, assuming an affirmative answer to the first, does such liability extend to the Sheriff, the commanding officer of the law enforcement unit involved here in his official capacity either because of the Sheriff's prior failure to train and discipline his force or because of ratification of the illegal acts found by the jury through failure to investigate and determine and punish the individual officers concerned, thus ratifying their acts. The third issue concerns whether, as found below, Wayne County could be held to be jointly liable with the Sheriff as the unit of local government which finances the Sheriff's Department and/or because the Sheriff makes police policy for the County. In this opinion we answer all three of the questions in the affirmative. Our holding as to County liability is based upon the fact that under the Michigan Constitution, the Sheriff makes police policy for the County.

The facts in this case are dramatic no matter which party is reciting them. Plaintiff was apparently a dope addict. After injecting heroin, he was arrested in a Wayne County park by a deputy sheriff named Swamba. When the deputy ordered him out of the car he was seated in, Marchese reached under the car seat and brought up a gun which he pointed at Deputy

Swamba.[1] Swamba dove for the gun and secured it. With the assistance of another deputy named Siemienski who had arrived on the scene and a passing civilian with a golf club, Marchese was seized, handcuffed, and placed in a squad car.

There is no doubt that Marchese was injured to some degree in the encounter with the two deputies (and the civilian who went to their aid) while they were engaged in the initial arrest. We emphasize, however, that the facts, which led to the jury award, do not include those which have just been recited.

The two episodes upon which plaintiff asserts and the jury found liability, are as follows:

Deputies Swamba and Siemienski took Marchese to the Wayne County Sheriff's Department Road Patrol Station on Henry Ruff Road in Westland, Michigan. At the entrance to the station, Marchese was greeted by a group of angry deputies with shouts of "cop killer." Marchese's testimony indicates that he was frightened and, although handcuffed, attempted to flee. He was quickly recaptured and thereafter, he asserts, was beaten by various officers as he was taken into the station house.

Marchese was booked and locked in a cell in the station house. He was allowed to see a lawyer named Mogill.

The second episode occurred that night. Marchese's testimony is that, after he had been locked in a cell at some time close to midnight, a deputy having possession of the key to his cell opened the door and admitted to the cell someone who attacked him, beating him violently with some hard object. His testimony was as follows:

---

[1] Marchese was punished with due process of law for this conduct. He pled guilty to felonious assault and was sentenced to a term of 3 to 4 years. He served a total of 32 months in the Michigan Prison system. He was deported to Canada upon his release. The jury in this case was fully aware of Marchese's conviction and sentence. The initial complaint in our instant case was filed pro se while Marchese was in prison.

Q Mr. Mogill left; would that be correct?

A Oh, yes. It was later on in the afternoon.

Q What happened next?

A After I was in my cell, I laid down for awhile, just sat there. I was trying to figure out what was going on, what was happening to me. Every once in a while I'd just hear laughter and someone yelling at me or taunting me, threatening me.

I laid there until late – until it got dark.

After it started getting dark, I heard the jingle of some keys coming down the hallway.

Q Were you sleeping at that time or had you been at all?

A I was trying to sleep, but I was just laying there.

Q How long had it been dark at that time, approximately?

A A few hours.

Q Would this be late at night, then?

A Yes. It would have been late at night.

Q What was the first thing you heard?

A I just heard the jingling of keys was the first thing I heard. Then I heard my door open.

Q The door to your cell?

A To my cell.

Q Did you hear any voices?

A No. I didn't hear any voices at all.

Q Did you hear any other sound?

A Just the keys and the door opening.

Q Okay. You were alone in your cell at that time?

A That's correct.

Q Okay. What was the next thing that occurred?

A Well, this deputy let somebody into my cell. The guy that he let in just dragged me in off the bench and started hitting me with something in the face, in the chest, started hitting me repeatedly, and I started yelling to find out what was going on.

I thought they didn't know what was happening. This guy just kept hitting me with something in his hand. He didn't say nothing. He kept punching and punching and hitting me with something in his hand and I start yelling, and I heard laughter coming from outside the corridor.

Q What did you do other than yell?

A That's all I could do. My wrists were sore from earlier. I was pretty exhausted from the whole day.

Q Did you resist the beating?

A I resisted as much as I could, which wasn't too much by that time. Whatever he hit me with in the face the first time just took a lot of the fight right out of me.

Q About how long did the beating go on?

A Quite a few minutes.

Q What was the next thing that occurred?

A The deputy came back and took the other person in the cell out of the cell and they both walked away and all I heard was some chuckling.

Q What was your physical condition at that time?

A Exhausted, sore and a lot of pain. My head was throbbing. My wrists were sore. My groin was sore, and I had just – I just about passed out. As a matter of fact, I think I did pass out.

Q Were you bloody at that time, did you notice?

A I didn't notice if I was bloody or not. There was no light. I couldn't see where there – there was no lights on where I was, so I couldn't see anything.

Q So the cell area was completely dark at that time?

A Yes, it was.

Q Okay. You said you passed out?

A Yes, I did.

The testimony presented by defendants concerning Marchese's accusations of being beaten at the entrance to the station and in his jail cell essentially implied that no such events occurred.

Obviously, however, the jury chose to believe the beatings did occur, and our reading of this record leaves us in no doubt that there was evidence from which the jury could properly have reached that conclusion. In fact, items of evidence from the defendants' side of the case tend to support Marchese's story of the midnight assault. The shift commander at the station house on the night concerned, Lieutenant McLogan, testified that there was "an air of hostility" among the sheriff's officers toward Marchese on the night when he testified he was beaten. Lieutenant McLogan also testified that access to Marchese's cell could only be gained by use of the key which was in the shift officer's control and possession. Further one of the original arresting officers, Deputy Siemienski, testified on a deposition which was read to the jury that a detective in charge of the case had told him (Siemienski) that Marchese had been "worked over the night before."

The jury also heard testimony by Deputy Alcorn (also by deposition read into the record) that he "sure wouldn't tell anybody" if he had beaten the prisoner. Considerably more specific and completely uncontroverted evidence came out of

Marchese's appearance before a state District Court Judge the following morning. In these state court proceedings Marchese was represented by Attorney Mogill who, at trial of the instant case, before the federal District Court, placed in the record a description of Marchese's condition as he appeared at the state court arraignment:

> [Attorney Mogill]
>
> A I advised the Court that on the previous afternoon I had noted a number of bruises and lacerations about Mr. Marchese's body, and then I advised the Court that his condition that morning, the 15th, was substantially different than when I had seen him the previous day.
>
> He did not have a black eye, he did not have blood on his shirt; that on this morning, the next morning, however, that he had what I described at that time as a terrible black eye, his left eye, that – I believe it was the left eye, his mouth was swollen, that blood was over his shirt as a result of bleeding from the head and that I asked for medical attention.
>
> Q Did you advise the Court as to how these injuries had occurred?
>
> A Well, according to the transcript here, I indicated only that – "whether it was through negligence or intentional acts, somebody between yesterday evening and this morning has assaulted [Mr. Marchese][2] while in the custody of the Wayne County Sheriff's."
>
> Q Did you, during that proceeding, ask the Court to take any action or ask for medical treatment for your client?

---

[2] Attorney Mogill at this point used the name "Taveroni" under which Marchese was registered after his arrest.

A Yes.

Q What specifically did you request or ask for?

A On page 7 of the transcript, it indicates that I had another matter to bring up to the Court; I would like to obtain medical assistance and whether or not the facilities were available within the Sheriff's Department. I wanted to see to it that they weren't – that the Court –

Q In your opinion, did your client need medical assistance at that time?

A Very clearly, yes.

The state District Court Judge, observing Marchese's condition, ordered the Sheriff's representative present at the hearing, to initiate an investigation of who and what had produced his injuries.[3]

The Sheriff's subsequent failure to order and direct an investigation which disclosed exactly who were the perpetrators of these brutal violations to the U.S. Constitution and to administer censure and punishment served to confirm the existence of an unstated "policy" of toleration of illegal brutality toward any county prisoner who had threatened the life of a sheriff's deputy.

The Law Applicable To This Case

The underlying law applicable to this case is contained in two amendments to the Constitution of the United States – particularly in the guarantee of "due process of law" recorded in the Fifth and Fourteenth Amendments. The due process clause of the Fifth Amendment, of course, antedated the ad-

[3] The Sheriffs representative, Detective Paterson, was also the officer who informed Deputy Sieminski that Marchese had been "worked over the night before."

mission of the State of Michigan to the Union and was accepted by Michigan when it entered the Union.

The Fifth Amendment in applicable part provides: "nor be deprived of life, liberty or property without due process of law."

The Fourteenth Amendment in applicable part provides: "*nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added.)

This case is brought under 42 U.S.C. § 1983 which in applicable part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The facts in this case are close kin to those cases notorious in American law where, because helpless victims have been abused under color of legal authority, the Supreme Court has granted relief in one form or another. *See Rochin* v. *California*, 342 U.S. 165 (1952); *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Monroe* v. *Pape*, 365 U.S. 167 (1961).

Several of these cases involve such outrageous abuse of defenseless citizens as to "shock the conscience of the court." Applying that description to the facts of this case is, we believe, appropriate, albeit we recognize that by so doing, we do not determine the legal issues here presented.

We believe that the District Court's jury award rests upon four fundamental legal bases:

1) 42 U.S.C. § 1983.

2) The Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI.

3) *Monell's* overruling of *Monroe* v. *Pape.*

4) The Supreme Court's recent opinion in *Brandon* v. *Holt*, 105 S.Ct. 873 (1985).

We believe that the fundamental case law applicable to this appeal was established some years ago by the interplay between *Monroe* v. *Pape*, 365 U.S. 167 and *Monell* v. *Dept of Social Services of the City of New York*, 436 U.S. 658.

In *Monroe*, the Supreme Court upheld the right to sue Chicago Police Officers for violations of federal citizens' federal constitutional rights. The Court said:

> There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. *See Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278, 287-296. The question with which we now deal is the narrower one of whether Congress, in enacting § 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Cf. *Williams* v. *United States*, 341 U.S. 97; *Screws* v. *United States*, 325 U.S. 91; *United States* v. *Classic*, 313 U.S. 299. We conclude that it did so intend.

Monroe v. *Pape*, 365 U.S. at 171-172.

Of particular applicability to our instant case is the Court's description of the third aim of § 1983 which was "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 174. Nonetheless, the *Monroe* court, while upholding plaintiff's right of action under § 1983 against the Chicago Police Officers, also held that § 1983 was not intended to grant a right of action against local units of government and hence, dismissed the suit as to the City of Chicago. *Id.* at 187-192.

Seventeen years later, however, in a thorough analysis of congressional debate preceding adoption of § 1983, the Supreme Court overruled this latter holding in *Monroe*. The opinion for the Court held:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167-168 (1970): "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . Although not authorized by written law, such practices of

> state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

Monell v. *Dept. of Social Services of the City of New York*, 436 U.S. at 690-691 (footnotes omitted).

The dispositive paragraph of *Monell* as we read it, shows that local government units can be sued and recovered against by citizens for deprivation of federal constitutional rights provided only that the local unit of government cannot be held liable solely on a theory of respondeat superior. *Id.* at 691.

Very recently in a case coming from this Circuit, the Supreme Court has revisited § 1983 and reaffirmed in even stronger language its *Monell* holding. In *Brandon* v. *Holt*, *supra*, the Supreme Court reaffirmed the law which has been described above as follows:

> In *Monroe* v. *Pape*, 365 U.S. 167, 187-192 (1961), the Court held that a city was not "a person" within the meaning of 42 U.S.C. § 1983. That construction of § 1983 protected municipalities from liability in cases of this kind until June 6, 1978, when we decided *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978). The complaint in this case was filed on February 22, 1978, before *Monroe* v. *Pape* was overruled; this explains why the city of Memphis was not named as a defendant in this case. The timing of the complaint may also explain why petitioners did not expressly allege at the outset of the litigation that they were suing Chapman in his official capacity as Director of Police of the Memphis Police Department.
>
> The course of proceedings after *Monell* was decided did, however, make it abundantly clear that the action against Chapman was in his official capacity and only in that capacity. Thus, in petitioners' response to a defense motion for summary judgment, petitioners' counsel stated:

> "Defendant Chapman is sued in his official capacity as Director of Police Services, City of Memphis, Tennessee. '[O]fficial capacity suits generally represent an action against an entity of which an officer is an agent. . . . *Monell* v. *New York Department of Social Services*, 436 U.S. 658, 690 n. 55 (1978).'"

The point was reiterated in counsel's opening statement, in the trial court's evidentiary rulings, in the findings on liability, and in the proceedings relating to damages in which it was recognized that our decision in *Newport* v. *Facts Concert, Inc.*, 453 U.S. 247 (1981), precluded an award of punitive damages against Director Chapman.

The Court of Appeals also repeatedly noted that the suit against Chapman was "in his official capacity." Moreover, while the appeal was pending Director Chapman left office and was replaced by John D. Holt. Pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure, Holt was automatically substituted as a party. It is Director Holt who appears as a respondent in this Court, and there is not even an arguable basis for claiming that the record would support an award of damages against him individually.

Given this state of the record, even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact. Moreover, it is appropriate for us to proceed to decide the legal issues without first insisting that such a formal amendment be filed; this is because we regard the record as plainly identifying petitioners' claim for damages as one that is asserted against the office of "Director of Police, City of Mamphis," rather than against the particular individual who occupied that office when the claim arose. Petitioners are claiming a right to recover damages from the city of Memphis.

II

> In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicit.
>
> In *Monell*, the City of New York was not itself expressly named as a defendant. The suit was nominally against the City's Department of Social Services, but that department had no greater separate identity from the City than did the Director of the Department when he was acting in his official capacity. For the purpose of evaluating the City's potential liability under § 1983, our opinion clearly equated the actions of the Director of the Department in his official capacity with the actions of the City itself.

Brandon v. *Holt*, 105 S.Ct. at 876-878.

We return now to our instant case

This case presents assaults upon a defenseless prisoner both as he was being brought into the road patrol station house with his hands handcuffed behind him and in his darkened cell near midnight when, as the jury obviously found, he was beaten with some hard object after his cell was unlocked by a key admittedly committed to the care of the duty officer. We view the key and its use in this instance as the symbol of the involvement in this assault of the defendant the Sheriff of Wayne County and the County of Wayne itself.

The evidence is such as to demand acceptance of the fact that 1) the shift officers on duty knew when this assault was going to take place, 2) heard it in progress and 3) sought to the degree possible, to cover up the attack after it occurred.

Not only do the facts show that there was official toleration, (if not complicity in instigation) of the midnight assault on the part of the command officers on duty at the station house

that night; but there was also subsequent concealment followed by a complete failure to initiate and conduct any meaningful investigation on the part of the Sheriff himself.

Careful attention to this record convinces this court that although reports concerning the evidence of Marchese's arrest and incarceration were required from the shift commanders, there was, in fact, no serious investigation conducted either by Sheriff Lucas or any of his deputies. This record does not reveal that any perpetrators were identified; or that any penalties or reprimands were ordered as to officers in charge at the times and places of the assaults.

The principal legal issues of this appeal are:

> I. Whether the trial court should have granted Sheriff Lucas' motion for a directed verdict or judgment notwithstanding the verdict on 1) the failure to train and discipline his officers, and 2) the failure to investigate plaintiff's complaints;
>
> II. Whether Wayne County should have been dismissed as a defendant, based either on an immunity conferred by Art. 7, Section 6 of the Michigan Constitution, or because the County cannot generate policy affecting Sheriff's Department operations under Michigan statutes.

At the beginning of our discussion of the law of this case, we observe that two events recorded in this trial account for the jury verdict and its award. As these events obviously shocked the conscience of this Wayne County jury, they also shock the conscience of this court. These events are 1) the attack by deputy sheriffs upon Marchese at the entrance to the Sheriff's station house on Harvey Ruff Road, and 2) the midnight assault upon Marchese in his jail cell in the station house. This record does not disclose the presence of any persons on the scene of either of these events except personnel of the Sheriff's Department. Such undisciplined conduct on the part of law enforcement officers speaks ab initio of lack of training and discipline. When joined to the

fact that this record does not identify any participant in these obviously illegal assaults (although supervisory officers were present at both), the record also speaks of a failure to provide a trained and disciplined county law enforcement agency.

At this same point, it is appropriate for us to record our full awareness that Sheriff Lucas was not on the scene at either of these two occurrences and may well not have received word of them at least until after Marchese's appearance before the state District Court on the following morning. Sheriff Lucas actually testified that he knew nothing about these matters until years later and shortly before this trial. This may be true but the Sheriff is sued here in his official capacity and in that capacity, he had a duty to both know and act.

The Sheriff's Liability

We conclude from these facts and the law set forth above that the "official policy" of the sheriff and the County of Wayne as represented by him in police matters, 1) had not required appropriate training and discipline of his officers, and 2) where a citizen had made a life-threatening gesture by pointing a gun at a sheriff's deputy, subsequent assault by brother officers, upon a prisoner, would not engender either serious investigation to discover the perpetrators or official sanctions against their conduct. It is this latter official policy which we also regard as ratification of the illegal acts of the unidentified officers whom the jury found to have inflicted injuries upon plaintiff Marchese which plaintiff claims warranted a judgment in his favor of $125,000 from the Sheriff and the County.

The County's Liability

The liability of the County of Wayne rests on the failures of the Sheriff which we have previously described. It is clear that under the Michigan Constitution of 1963 Art. 7,

Section 6, Wayne County did not make policy for the Sheriff's Department. The Sheriff is, however, the law enforcement arm of the County and makes policy in police matters for the County. *See* Michigan Constitution 1963 Art. 7, Section 4. The County, through its Board of Supervisors, appropriates funds and establishes the budget for the Sheriff's Department. The Sheriff is elected by the voters of Wayne County. No doubt he is responsible for enforcing state law and presumably federal law as well. But equally clearly he is not an official of the State of Michigan or of the federal government. He is, under the Constitution of Michigan, the law enforcement officer for the County of Wayne with extraordinary power to select his deputies and enforce the law.

We believe that the relationship between the County and the Sheriff's Department is so close as to make the County liable for the Sheriff's failure to train and discipline his officers and his ratification of the use of wanton brutality by members of his force which we have spelled out above. Obviously this holding is consistent with and indeed compelled by the U.S. Supreme Court's decision in *Brandon* v. *Holt, supra.* The County's reliance on Michigan law to exempt it from liability is clearly inappropriate under *Brandon* and for that matter under the federal Constitution's Supremacy Clause, *supra.*

We have, of course, reviewed the original brief and the response of defendants-appellants, County of Wayne and William Lucas in his official capacity as Sheriff of Wayne County. We agree with the County's brief to the extent that it relies upon the following paragraph from *Monell*:

> We conclude, therefore, that a local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.

Monell v. *Dept. of Social Services of the City of New York*, 436 U.S. at 694.

The District Judge was well aware of the fact that liability in this case could not be found on the basis of respondeat superior and he clearly and correctly instructed the jury on this issue.

As we have previously made clear, we believe this record shows that these injuries resulted from official policy of the Sheriff of Wayne County and that the judge's charge and the jury award are consistent with *Monell*.

Our review of the record of this trial indicates that the trial judge committed no reversible error either during the trial or in the charge which he had worked out carefully with both parties to this controversy.

The judgment of the District Court is AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 8-71366

SALVATORE MARCHESE,

Plaintiff

vs.

WILLIAM LUCAS, Individually and as Sheriff of Wayne County, Michigan, FRANK SIEMIENSKI, OFFICER ALCORN, JOHN DOE and THE COUNTY OF WAYNE, Jointly and Severally,

Defendants

ORDER OF JUDGMENT

At a session of said Court held in the U.S. Courthouse, in the City of Detroit, State of Michigan, this May 26, 1982.

PRESENT: HONORABLE JULIAN A. COOK, JR.
U.S. District Court Judge

The above-entitled action, having come on for trial before a jury; the parties being present and represented by their respective attorneys, and having presented evidence and arguments in open Court; and the jury having returned its verdict in favor of Plaintiff, Salvatore Marchese, and against the Defendants, County of Wayne and Sheriff William Lucas, in his official capacity, only; and further the jury having returned its verdict in favor of Defendants Lawrence Alcorn and Frank Siemienski and against the Plaintiff;

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiff, Salvatore Marchese, recover from Defendants, County of Wayne and Sheriff William Lucas, in his official capacity, jointly and severally, damages in the amount of $125,000.00, plus costs and attorney fees to be taxed.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff, Salvatore Marchese, recover nothing from Defendants, Lawrence Alcorn and Frank Siemienski.

/s/ JULIAN ABELE COOK, JR.
U.S. DISTRICT COURT JUDGE

APPENDIX "C"

No. 83-1001

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SALVATORE MARCHESE,

Plaintiff-Appellee,

v.

WILLIAM LUCAS AND THE COUNTY OF WAYNE,

Defendants-Appellants.

BEFORE: KRUPANSKY, Circuit Judge, EDWARDS and PECK, Senior Circuit Judges

ORDER

(Filed July 3, 1985)

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case as amended below.

On page 16 before the first full paragraph and continuing after "agency" on line 4, the following is hereby added:

"Deputy Sieminski, Officer Alcorn, and Sergeant Robinson all testified that, at the time of the incidents

in question, they had not received any training in the care, treatment, and handling of prisoners in their custody. Robinson testified that he did receive such training in 1982, six years after Marchese was beaten. (Jt. App. pp. 260-261, 360, 406-407)."

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX "D"

The Act of June 15, 1836, 5 Stat. 49, § 2 provided:

And be it further enacted, That the Constitution and state government which the people of Michigan have formed for themselves be, and the same is hereby accepted, ratified and confirmed, and that the said state of Michigan shall be, and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original states, in all respects whatever: Provided, always, And this admission is upon the express condition, that the said state shall consist of, and have jurisdiction over, all the territory included within the following boundaries, and over none other, to wit: Beginning at the point where the above described northern boundary of the state of Ohio intersects the eastern boundary of the state of Indiana, and running thence with the said boundary line of Ohio, as described in the first section of this act, until it intersects the boundary line between the United States and Canada, in Lake Erie; thence with the said boundary line between the United States and Canada, through the Detroit river, Lake Huron and Lake Superior, to a point where the said line last touches Lake Superior; thence in a direct line through Lake Superior, to the mouth of the Montreal river; thence through the middle of the main channel of the said river Montreal, to the middle of the Lake of the Desert; thence in a direct line to the nearest head water of the Menominie river; thence through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominie river; thence down the centre of the main channel of the same, to the centre of the most usual ship channel of the Green Bay of Lake Michigan; thence through the centre of the most usual ship channel of the said bay, to the middle of Lake Michigan; thence through the middle of Lake Michigan to the northern boundary of the state of Indiana, as that line was established by

the act of congress of the nineteenth of April, eighteen hundred and sixteen; thence due east, with the north boundary line of the said state of Indiana, to the northeast corner thereof; and thence south, with the east boundary line of Indiana, to the place of beginning.

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR
CLERK

No. 85-359 (2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BEST AVAILABLE COPY

COUNTY OF WAYNE and WILLIAM LUCAS,
Petitioners,

-vs-

SALVATORE MARCHESE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STARK AND GORDON
BY: DEBORAH L. GORDON (P27058)
BRIAN B. SMITH (P36907)
1600 Ford Building
Detroit, Michigan 48226
(313) 962-3784

Attorneys for Respondent

THE AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

19 pp

QUESTIONS PRESENTED

I. WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT 42 U.S.C. §1983 CREATES AN ACTION FOR DAMAGES WHEN A PRISONER IS TWICE BEATEN SEVERELY WHILE IN THE CUSTODY AND COMPLETE CONTROL OF SHERIFF'S OFFICERS?

II. ASSUMING THE COURT OF APPEALS WAS CORRECT IN ANSWERING QUESTION I AFFIRMATIVELY, WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT §1983 LIABILITY EXTENDS TO THE WAYNE COUNTY SHERIFF, EITHER BECAUSE OF THE SHERIFF'S FAILURE TO TRAIN AND DISCIPLINE HIS OFFICERS OR BECAUSE OF RATIFICATION OF THE ILLEGAL ACTS FOR FAILURE TO INVESTIGATE AND PUNISH THE INDIVIDUAL OFFICERS RESPONSIBLE FOR THE BEATINGS?

III. WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT WAYNE COUNTY COULD BE HELD LIABLE FOR THE ACTIONS OF THE SHERIFF BECAUSE THE COUNTY FINANCES THE SHERIFF'S DEPARTMENT, THE SHERIFF IS ELECTED BY COUNTY VOTERS AND/OR BECAUSE THE SHERIFF MAKES POLICE POLICY FOR THE COUNTY?

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No. 85-359
IN THE SUPREME COURT
OF THE UNITED STATES

COUNTY OF WAYNE and WILLIAM LUCAS,
Petitioners,

-vs-

SALVATORE MARCHESE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Salvatore Marchese, respectfully submits that the Petition for a Writ of Certiorari should be denied.

OPINIONS BELOW

The decision of the Court of Appeals is reported as *Marchese* v *Lucas*, 758 F.2d 181 (6th Cir. 1985). The Order denying the petition for rehearing *en banc*, which is not reported, was filed July 3, 1985. The District Court's Order of Judgment, which is dated May 26, 1982, is also unpublished.[1]

COUNTER-STATEMENT OF THE CASE

Petitioners would have this Court believe not only that Respondent, Salvatore Marchese, was beaten in merely an "isolated incident" of police misconduct, but that this case is factually indistinguishable from *Oklahoma City* v *Tuttle*, 472 U.S. , 105 S.Ct. 2247, 85 L.Ed.2d 791 (1985). Nei-

[1] Citations to the Opinions below are to the Appendix to the Petition for a Writ of Certiorari and are designated as A . Citations to the record below are to the Joint Appendix in the Sixth Circuit and are designated as J.App. .

ther proposition could be further from the truth. To begin with, the Court of Appeals squarely stated, at the outset of its Opinion, that "[Respondent] was *twice* beaten severely while in the custody and complete control of Sheriff's officers." [A. p.2a, emphasis added]. The overwhelming lack of similarity between the situation in *Tuttle*, in which a rookie police officer made a split-second decision to shoot an alleged robbery suspect, and the facts of the instant case will become readily apparent in a moment.

Taking the facts in the light most favorable to the Respondent, on May 14, 1976, Salvatore Marchese, a heroin addict, was pulled over by a Wayne County Sheriff's Deputy in a suburban Detroit park. The deputy, Edward Swamba, ordered Marchese out of his car, and Deputy Swamba proceeded to pat him down and ask for identification. When Marchese reached back into his car to retrieve his indentification, a struggle ensued during which Marchese pointed a gun at Deputy Swamba. Shortly thereafter, additional Sheriff's deputies arrived at the scene, and they assisted Swamba in securing the gun from Marchese. One such deputy, Frank Siemienski, handcuffed Marchese and placed him in the back of his patrol car.

As Deputy Siemienski was transporting Marchese back to the Sheriff's Road Patrol Station, he told Marchese that "they had something waiting" for him at the station [J. App. p. 220]. Upon his arrival, 10-15 deputies were in the parking lot waiting for him. Marchese became frightened for his safety and tried to run. The deputies quickly apprehended him and dragged him back toward the station by his hair. As Marchese was being dragged by his hair, the other deputies kicked, punched and verbally threatened him. Among other epithets, they called him a "fucking dirty cop killer", and they told him they were "going to get" him [J. App. p. 221].

Shortly thereafter, the deputies booked him and placed him in a cell. Subsequently, Kenneth Mogill, a criminal attorney, visited Marchese at the station, and while he was there he made notes of the injuries which Marchese had

sustained. Later that night, after the shift change, Marchese was lying in his cell trying to sleep. He heard the jingling of keys, and a deputy let someone into his cell.[2] The person who entered his cell dragged him off the bench and began hitting him with a hard object in the face and chest. When Marchese yelled out, he heard laughter coming from outside the corridor. The beating lasted quite a few minutes, while the assailant continually punched Marchese with some hard object. Finally, the deputy came back to retrieve the person who had been beating Marchese, and as they walked away all Marchese heard was chuckling [J. App. p. 226].

The next morning, when Detective Larry Patterson, who was in charge of the criminal matter, came to get Marchese for his arraignment, he looked at Marchese and asked him what had happened. Marchese informed him that a deputy had beaten him up, but Patterson did not reply. At Marchese's arraignment, Kenneth Mogill, angered by Marchese's worsened physical appearance, placed his observations and objections on the court record. Mogill testified in the instant case that he had brought to the state court's attention the fact that Marchese's injuries the day before (May 14, 1976) did not include a terrible black eye, a swollen mouth and blood all over his shirt, and that he had apparently sustained these injuries while in the custody of the Wayne County Sheriff.[3] In response, a state District Court Judge ordered Detective Patterson to initiate an investigation into how Marchese sustained his injuries. Patterson agreed to conduct an investigation. However, the evidence adduced at trial revealed that no such investigation ever took place.

---

[2] Marchese testified that it was too dark in his cell to see anything. He did know that it was approximately midnight, however, because during the subsequent nights he spent in confinement at the facility he learned that the shifts changed at 11:00 p.m.

[3] Marchese's injuries also included a deviated septum, badly swollen wrists (one of which was fractured slightly), having his jaw knocked out of place, and numerous bruises and lacerations.

At trial, the evidence showed that Lieutenant Dennis McLogan, a 15 year veteran in May, 1976, was the commander in charge of the Road Patrol Station's midnight shift on May 14 and 15, 1976. His assistant that night was Sergeant Jack Robinson, a 13 year veteran in May, 1976. Lieutenant McLogan had final responsibility during the midnight shift for any problems with prisoners, the keys to the cell block and any errors that occurred. Lieutenant McLogan also testified that he identified himself with the interests and policies of the Sheriff's Department [J. App. p. 314]. Lieutenant McLogan and Sergeant Robinson were located at the front desk, in an area where they spent approximately 90% of their time.

From their work area, these two command officers supervised the operation of the Road Patrol Station. They not only had possession and control of the keys to the cell block at all times, but they could hear almost all noise originating in the cell block area. Sergeant Robinson testified that he could even hear a "whisper for help" [J. App. pp. 281-282]. Moreover, the keys to the cell block and the key ring were large, heavy and made of brass, and they were quite noisy when in use. Lieutenant McLogan and Sergeant Robinson contended at trial, however, that they checked on Marchese periodically during the night and never observed any marks on him or signs of injury. They also testified that they were unaware of anyone entering Marchese's cell that night for any reason.

Yet both command officers were very much aware of Marchese's presence. They knew, along with virtually every Sheriff's deputy on duty that night, that Marchese had pointed a gun at a brother officer earlier in the day. Lieutenant McLogan noted that "there was an air of hostility" toward Marchese among the officers as a result of the Marchese/Swamba incident [J. App. p. 333]. In fact, Deputy Siemienski, one of the original arresting officers, admitted under oath that Detective Patterson had told him that Marchese "was worked over" the previous night [J. App. p. 375].

Aside from these specific incidents in which Wayne County Sheriff's deputies beat up Salvatore Marchese, however, virtually every officer who testified had witnessed prior acts of prisoner abuse by Sheriff's deputies. Most significantly, Lieutenant McLogan, who identified himself with the interest and policies of the Sheriff's Department, testified that although he has seen officers use excessive force against prisoners, he has never reported it [J. App. p. 336]. Lieutenant McLogan also stated that "officers are reluctant to rat on each other" and that "[n]o one wants to put the finger on a fellow officer" [J. App. p. 333]. Officer Laurence Alcorn lent persuasive additional support to Lieutenant McLogan's proposition by stating, "[i]f I went and beat a man, I sure wouldn't tell anybody" [J. App. p. 419]. Accordingly, even if Detective Patterson had attempted to conduct an investigation (none of the officers who testified, nor Mogill nor Marchese were ever asked by anyone from the Sheriff's Department to give statements about the beatings), it is doubtful he would have discovered anything from any of the officers. Finally, as the Court of Appeals found with regard to Respondent's allegations that the Sheriff's Department has failed to properly train its force:

> "Deputy Sieminski, Officer Alcorn, and Sergeant Robinson all testified that, at the time of the incidents in question, they had not received any training in the care, treatment and handling of prisoners in their custody. Robinson testified that he did receive such training in 1982, six years after Marchese was beaten." [A. pp. 21-22a].

REASONS FOR DENYING THE WRIT

Petitioners have managed to ignore the most salient facts adduced at trial, many of which, as the Court of Appeals noted, came "from the Defendants' side of the case" [A. p. 6a], in their vain attempt to pin the label "single isolated incident" on the instant case. The Court of Appeals made it abundantly clear that it did not base its holding on any injuries Marchese sustained at the scene of his arrest.

Rather, they only found Defendants liable for the two subsequent beatings, one of which occurred as Marchese was dragged into the Road Patrol Station, and the other as he attempted to sleep in his jail cell [A. p. 3a]. Moreover, virtually every officer who testified at trial had witnessed prior acts of prisoner abuse by Sheriff's deputies, but no one had ever reported any such acts. Neither beating to which Marchese was subjected was isolated. To the contrary, they were thoroughly orchestrated events carried out with the approval of supervisory, commanding officers in retaliation for an apparently life-threatening assault upon a brother officer. The evidence thus overwhelmingly supports and confirms the Court of Appeals' holding that Wayne County and its Sheriff could be held liable either because of the Sheriff's prior failure to train and discipline his force, or by ratification of the Marchese beatings through its failure to investigate and punish the offending officers.

None of the cases cited in Petitioners' Brief are dispositive in resolving the questions presented by this appeal, but all of them either support the Court of Appeals' holding or are completely distinguishable. In *Oklahoma City* v *Tuttle*, 472 U.S. ____, 105 S.Ct. 2247, 85 L.Ed.2d 791 (1985), although this Court took a "small but necessary step" toward defining the contours of municipal immunity under 42 U.S.C. §1983, 105 S.Ct. at 2429, it did so in the context of what was truly a single, isolated incident. In *Tuttle*, a "low-level police officer", 105 S.Ct. at 2440, n. 5 (Brennan, J., concurring), acting alone, shot and killed an alleged robbery suspect during a momentary pursuit, on foot, outside a bar. As Justice Rehnquist noted in his plurality opinion, to impose liability under such circumstances "would be to impose it simply because the municipality hired 'one bad apple'." 105 S.Ct. at 2435. Similarly, in *Rymer* v *Davis*, 754 F.2d 198 (6th Cir. 1985), *vacated and remanded sub nom. City of Shepherdsville* v *Rymer*, 472 U.S. ____, 105 S.Ct. 3518, 75 L.Ed.2d 791 (1985), a lone city police officer beat and kicked the plaintiff truck driver during an arrest on a highway. This Court vacated the Circuit Court's decision

upholding §1983 liability against the city in *Rymer* and remanded it for further consideration in light of the *Tuttle* opinion.

Significantly, the *Tuttle* opinion was announced a full month before the Sixth Circuit issued its order denying Petitioners' petition for rehearing *en banc* in the instant case [A. pp. 21-22a]. Because Petitioners had immediately submitted the *Tuttle* opinion to the Court as — they contended — conclusive authority before rehearing was denied, it can safely be stated that the Sixth Circuit has already considered the instant case in light of *Tuttle* and determined that no decisional change is warranted.

Neither can the Sixth Circuit's decision in *Pembauer* v *City of Cincinnati*, 746 F.2d 337 (6th Cir. 1984) nor this Court's granting of the writ of certiorari, ____ U.S. ____, 105 S.Ct. 3475, 85 L.Ed.2d ____ (1985), be regarded as controling authority either, on the issue of whether the instant case was wrongly decided on single incident grounds. In *Pembauer*, police officers for the City of Cincinnati and Sheriff's deputies for Hamilton County broke down a doctor's office door in an effort to serve capias warrants on two of the doctor's employees. Apparently, the doctor was injured[4] during the officers' entry onto his premises. The City Police Chief testified that the policy and past practice of his department was to use whatever force was necessary to serves a capias. Because the court could not determine if the policy identified by the police chief was the cause of Dr. Pembauer's injury, it remanded the case to the district court with instructions to make that determination.

In addition, the court upheld the district court's decision to dismiss Hamilton County as a defendant on the grounds that a "single, discrete decision" by the county prosecutor to serve the capiases was insufficient to establish that the

[4] There is no mention in the court's opinion as to what injury Dr. Pembauer allegedly sustained.

prosecutor or sheriff was implementing a governmental policy. 746 F.2d at 341. Thus, *Pembauer*, like *Tuttle*, involved a single, isolated incident which may or may not have been caused by an official policy. That is simply not the situation in the instant case. Marchese was neither injured in an isolated incident, nor by a single, discrete decision. Rather, his severe beatings were administered pursuant to a carefully crafted, elaborate and widespread policy of "rough justice" administered to those perceived to have threatened the life of a fellow officer.

Petitioners' reliance on *Hays* v *Jefferson County*, 668 F.2d 869 (6th Cir. 1982), *cert. denied*, 459 U.S. 833, 103 S.Ct. 75, 74 L.Ed.2d 73 (1983) is also misplaced. In *Hays*, the issue was whether plaintiffs, who were beaten by police officers trying to disperse a crowd of demonstrators at a shopping mall, had asserted a valid §1983 claim against the county for defendants' "negligent training, supervision, and control of unidentified officers." 668 F.2d at 871. The Sixth Circuit's holding in *Hays*, that plaintiffs could not prevail on a §1983 claim predicted on negligence, was soundly rejected by this Court in *Parratt* v *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

Petitioners have further directed this Court to a "laundry list" of opinions from other circuits in support of its claim that somehow the instant case was wrongly decided [Petitioners' Brief, p. 12, n.3]. However, while a quick review of those opinions indicates that they do, in fact, reject the "single or isolated incident" as a basis for §1983 liability, not one of them involves more than a single, isolated incident of police misconduct. The following examples are illustrative. *Gilmere* v *City of Atlanta*, 737 F.2d 894 (11th Cir. 1984) [two low-level police officers responding to a run, beat and shot plaintiff's decedent during a struggle on the street]; *Cowdrey* v *City of Eastborough*, 730 F.2d 1376 (10th Cir. 1984) [two low-level police officers stopped arrestee on street, and arrestee sustained injuries during struggle with one police officer]; *Wellington* v *Daniels*, 717 F.2d 932 (4th Cir. 1983)

[sole low-level police officer struck plaintiff with Kel-lite causing plaintiff to suffer body paralysis]; and *Languirand* v *Hayden*, 717 F.2d 220 (5th Cir. 1983) [sole low-level police officer investigating call shot suspected prowler in neck]. Accordingly, the cases from other circuits cited by Petitioners do not have any application, and therefore, do not create a conflict with the instant decision by the Sixth Circuit.

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE EVIDENCE ADDUCED AT TRIAL, WHICH PROVED COMPLICITY, IF NOT INSTIGATION, BY SUPERVISORY, COMMAND OFFICERS IN THE BEATINGS OF RESPONDENT, ESTABLISHED POLICIES OF (1) TOLERATING ABUSE OF PRISONERS WHO MAKE LIFE-THREATENING ASSAULTS ON BROTHER OFFICERS AND (2) FAILING TO INVESTIGATE OR COVERING UP ALLEGATIONS THAT SUCH BEATINGS OCCUR.

In *Monell* v *Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 11 (1978), this Court held that local governments may be sued for constitutional deprivations visited pursuant to governmental custom, even though such custom has not received formal approval through the body's official decision-making channels. As this Court stated:

> "We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." 436 U.S. at 694.

This Court expanded on what "policy" means in *Tuttle*, *supra*, by stating that, "[a]t the very least there must be an

affirmative link between the policy and the particular constitutional violation alleged." 105 S.Ct. at 2436. Justice Rehnquist, who wrote the plurality opinion, also noted that "[r]espondent did not claim in the district court that Oklahoma City had a 'custom' or 'policy' of authorizing its police force to use excessive force in the apprehension of suspected criminals, . . ." *Id.* at 2434. Rather, respondent's sole theory of responsibility was that Oklahoma City had a "policy" which resulted in inadequately trained police officers, and that this "policy" resulted in the shooting death of respondent's husband. *Id.*

Applying *Monell* and *Tuttle* to the facts of the instant case, the evidence overwhelmingly mandates that this Court deny the Petition for Writ of Certiorari. Not only was Marchese beaten by a virtual mob of Sheriff's deputies as he was dragged, with his arms handcuffed behind his back, into the Road Patrol Station, but he was also viciously beaten several hours later, after a new shift had reported for duty, in his jail cell with full approval and knowledge of the commanding officers. From the moment of his arrest, Marchese was repeatedly threatened and told by Sheriff's deputies that they were "going to get" him for what he had done.

Lieutenant McLogan, who was the commanding officer in charge of the station at the time of the second beating, testified that he identified himself with the interests and policies of the Sheriff's department. Yet not only was he aware of the "air of hostility" towards Marchese that night, but he clearly knew of and perhaps instigated the beating of Marchese in his cell. Lieutenant McLogan further admitted that despite having witnessed deputies use excessive force against prisoners in the past, he had never reported any of it. Moreover, every other officer who testified echoed McLogan's practice, and Officer Alcorn went so far as to state that if he beat a man, he "sure wouldn't tell anybody" [J. App. p. 419]. Clearly, Marchese presented sufficient evidence to establish that Petitioners had a policy of encourag-

ing and subsequently covering up abuse of prisoners who had made life-threatening assaults on brother officers.

This evidence was reinforced by substantial additional evidence as well. Despite the fact that a state District Court Judge ordered Detective Patterson to conduct an investigation into Marchese's beatings, no investigation was ever conducted. In fact, the evidence indicated that Detective Patterson sought more to cover up the beating than to uncover who was responsible.[5] What is particularly shocking about Petitioners' failure to investigate is that Detective Patterson, who was in charge of this case, believed that the beatings took place. He told Deputy Siemienski that Marchese had been "worked over" [J. App. p. 375]. Additional evidence further revealed that Sergeant Robinson, Deputy Siemienski and Officer Alcorn had not received any training in the care, treatment and handling of prisoners in their custody at the time of Marchese's beatings, and each had been employed as a Deputy Sheriff for many years.

PETITIONERS' FAILURE TO OBJECT IN ANY WAY TO THE SINGLE INCIDENT JURY INSTRUCTION GIVEN AT TRIAL UNTIL FILING THEIR PETITION FOR A WRIT OF CERTIORARI CONSTITUTES A WAIVER OF THEIR RIGHT TO OBJECT UNDER FEDERAL RULE OF CIVIL PROCEDURE 51.

Rule 51 of the Federal Rules of Civil Procedure states, in pertinent part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before

[5] On May 17, 1976, two days after the midnight beating, Detective Patterson asked Lieutenant McLogan and Sergeant Robinson to indicate in writing that they had checked on Marchese during the night and that he was fine. Since the most serious injuries sustained by Marchese occurred during the second beating *in his cell* at midnight, the documentation requested by Patterson was intended to undermine the credibility of one of the more outrageous of a series of outrageous police practices proven at the trial of this case.

> the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The intent of Rule 51 is clear. If a party fails to object at trial, that party cannot later claim that the trial court erred in issuing jury instructions. In the instant case, Petitioners never raised any objection to the "single incident" jury instruction given at trial until filing its petition in this Court. Moreover, the first time Petitioners ever made a claim that either the district court or Court of Appeals had erred on the grounds that the instant case was based on a single incident was in their Petition for Rehearing *En Banc*. Respondent noted in his Brief in Opposition at that time that because Petitioners had failed to raise this defense prior to reaching that stage in the proceedings, they had waived their right to have the Sixth Circuit review that issue.

In *Tuttle, supra,* Justice Rehnquist specifically addressed the identical issue by stating:

> "Indeed, respondent's argument might have prevailed had it been made to the Court of Appeals . . . . Non-jurisdictional defects of this sort should be brought *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." 105 S.Ct. at 2432.

Accordingly, because petitioners failed to object to the single incident jury instruction prior to filing their Petition for Certiorari, and because Respondent is now timely raising his opposition to Petitioners' belated attempt to avoid the commands of Rule 51, Respondent submits that this Court must find that Petitioners cannot now claim as error the trial court's giving of the single incident instruction.

THE COURT OF APPEALS CORRECTLY FOUND THAT WAYNE COUNTY COULD BE HELD LIABLE FOR THE ACTIONS OF THE SHERIFF BECAUSE THE COUNTY FINANCES THE SHERIFF'S DEPARTMENT, THE SHERIFF IS ELECTED BY COUNTY VOTERS AND/OR BECAUSE THE SHERIFF MAKES POLICE POLICY FOR THE COUNTY.

The decision by the Court of Appeals rendering Wayne County liable for Sheriff Lucas' official actions is directly supported by another Sixth Circuit panel's opinion in *Pembauer* v *City of Cincinnati, supra. In Pembauer,* the appellate court found that the district court had incorrectly decided that, because the Hamilton County Board of Commissioners did not directly control the sheriff, he was not a county official. The *Pembauer* court had looked to virtually the identical factors as the court in the instant case in making the determination that the county could be liable under §1983 for those acts of the sheriff which represent official policy. Among other similar factors, the *Pembauer* court noted that the sheriff is elected by county voters, serves as the chief law enforcement officer for the county, submits his budget to the county, and receives all funding through the county. As the court stated, "we believe it is obvious that the sheriff is a county official." 746 F.2d at 341. Because Sheriff Lucas in the instant case meets all of the *Pembauer* criteria, the Sixth Circuit correctly concluded that *Brandon* v *Holt,* 469 U.S. , 105 S.Ct. 873, 83 L.Ed.2d 878 (1985) compelled a finding that the County be held liable for Sheriff Lucas' official actions.

In support of the proposition that Wayne County can never be held liable for the acts of the Sheriff, Petitioners have cited as authority two Supreme Court cases decided long before *Monroe* v *Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) even appeared on the horizon. *Forsyth* v *City of Hammond,* 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897) is clearly distinguishable from the instant case. In

Forsyth, there was a dispute as to whether the city could annex lands belonging to the plaintiff. The case involved a purely local dispute, and it did not involve any federal laws. Similarly, although *Highland Farms Dairy* v *Agnew*, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835 (1937) did involve a challenge against the Virginia "Milk and Cream Act" as unconstitutional under both the Virginia and United States Constitutions, the court specifically stated that the United States Constitution "had no voice upon the subject". 300 S.Ct. at 612. Clearly, Petitioners have been unable to advance any support for their proposition which, if carried to its logical conclusion, would allow a state legislature to override Congress' ability to safeguard equal protection of constitutional rights for all citizens.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

STARK AND GORDON

BY: DEBORAH L. GORDON (P27058)
BRIAN B. SMITH (P36907)
Attorneys for Respondent
1600 Ford Building
Detroit, Michigan 48226
(313) 962-3784

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No. 85-359

In The
Supreme Court of the United States
October Term, 1985

—o—

COUNTY OF WAYNE and WILLIAM LUCAS,
Petitioners,

vs.

SALVATORE MARCHESE,
Respondent.

—o—

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

—o—

PETITIONERS' REPLY BRIEF

—o—

JOHN D. O'HAIR
Wayne County Corporation Counsel

GLEN HOWARD DOWNS
Assistant Corporation Counsel
701 City-County Building
Detroit, Michigan 48226
Phone: (313) 224-5030

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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PETITIONERS' REPLY BRIEF

—o—

Some things in the Respondent's Brief in Opposition invite a reply—like the argumentative account of the evidence, a good part of which ranges between hyperbole and worse. But we will take that up later, if need be, and confine our reply here to Respondent's insistence that our first two Questions Presented for Review unjustifiably rely on what has been styled the single or isolated incident rule (Pet. for Cert. 11-12 & n. 3): i.e., the principle affirmed

by this Court in *Oklahoma City v. Tuttle*, — U.S. —, 105 S.Ct. 2427, 85 L.Ed. 2d 791 (1985) and by the vast majority of the Circuit Courts of Appeals that an "official policy" sufficient to impose official or governmental liability under 42 U.S.C. § 1983 cannot be proved inferentially on proof of a single or isolated incident of unconstitutional conduct.

I. This Case Is Properly Reviewable Under The Isolated Incident Rule.

The Respondent first argues the irrelevance here of the isolated incident rule, asserting that the assaults by sheriff's deputies were neither a single nor an isolated incident. During the hours immediately following his arrest, "[Respondent] was *twice* beaten severely * * * *" Respondent says (Resp.Br. 2) (emphasis Respondent's), and "[n]either beating * * * was isolated. To the contrary, they were thoroughly orchestrated events carried out with the approval of supervisory, commanding officers [at the suburban Detroit road patrol station] * * * *" (Resp.Br. 6)

Respondent persists in confounding his theory for the individual officers' liability (all of whom were either nonparties or exonerated at trial, Pet. for Cert. 5) with the requirements for establishing the Petitioners' liability on proof of their underlying "policy". This Court held in *Tuttle*, 105 S.Ct. at 2436, that "the word 'policy' generally implies a course of action consciously chosen from among various alternatives". The single incident rule embodies the commonplace that one instance of unconstitutional conduct against one person does not imply either that it was "consciously chosen" by municipal policymakers, or that it is part of a "course of action". Accordingly, the Re-

spondent's evidence of the circumstances surrounding only his post-arrest mistreatment on this one occasion would be sufficient (if believed) as against the officers individually; but neither in logic nor at law would that evidence suffice to prove the existence of any underlying official policy.

Therefore, under *Tuttle,* and with regard to the Petitioners' alleged and presumptively unconstitutional policy of condoning prisoner abuse by neither investigating it nor sanctioning those who commit it, evidence that only Respondent had been so abused during the brief time following his arrest, together with a silent record on whether an investigation or disciplinary action ensued, "is not sufficient to impose liability under *Monell* [because under the single incident rule] proof of the incident [does not include] proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Tuttle,* 105 S.Ct. at 2436. As for the alleged policies of inappropriate training and discipline of police officers which perhaps would not be facially unconstitutional, the record does not disclose (as the Court of Appeals' opinion indicates) "considerably more proof than the single incident * * * to establish both the requisite fault * * * and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle,* 105 S.Ct. at 2436.

II. Fed. R. Civ. P. 51 Does Not Bar This Court's Review Under The Isolated Incident Rule.

The Respondent's second argument on the isolated incident rule is that we did not raise the issue "until filing [our] Petition for a Writ of Certiorari" with this Court,

(Resp.Br. 11) and that we have therefore waived our right to a review of that issue under Fed. R. Civ. P. 51.

With regard to the "official policies" in our first two Questions Presented for Review, we respectfully point out that neither was ever amenable to review through a Rule 51 objection because neither of them appeared in the case until the Respondent's brief on appeal. They then became the Court of Appeals' theories for upholding the Petitioners' liability. We did challenge those policies at the earliest opportunity, which was when we submitted our Response Brief and, later, our Petition for Rehearing En Banc in the Court of Appeals.

We intimated in our Petition for a Writ of Certiorari that the Sixth Circuit used this case as the sequel to *Rymer v. Davis*, 754 F.2d 198 (6th Cir. 1985) *vacated and remanded sub nom City of Shepardsville v. Rymer*, 53 U.S.L.W. 3903 (U.S. July 1, 1985) (No. 84-1756) (Pet. for Cert. 10) perhaps with a view to establishing in the Sixth Circuit that either a "policy" or "custom" for 42 U.S.C. § 1983 purposes may be established by proof of a single incident of unconstitutional conduct. At any rate, the Petitioners could hardly anticipate at the district court instruction conference that this case would be used by the court on appeal to forge policy on issues not pursued at trial.

As for the presence of the isolated incident issue in the other contexts, we will stand by our statement in our Petition (Pet. for Cert. 11) that the issue has been in the case throughout. In addition to the instruction (Pet. for Cert. 11), it appears in all parties' appellate briefs in the

Sixth Circuit[1] and again, as mentioned earlier, in our Petition for Rehearing En Banc[2]. It was briefed on the merits in the Respondent's Response in Opposition to Appellants' Petition for Rehearing[3], and decided on the merits by the

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[1] Petitioners as appellants in the Court of Appeals argued that "there is a total absence of any testimony that would indicate what type of training would be necessary or relevant to ensure that an *isolated instance of alleged police brutality* did not occur". (emphasis added) (Appellants' Brief 18).

Respondent as appellee countered that "in Rizzo v. Goode * * * the court held that authorization and approval on the part of supervisory officials could be found when such an official failed to act or acted inadequately when he had actual or imputed knowledge of well-known, *isolated incidents of misconduct.*" (emphasis added) (Appellee Brief 17-18). Again: "this incident can be considered a *single, unusually brutal beating* which warrants the inference that it was attributable to inadequate training or supervision" (emphasis added) (Appellee Brief 19).

Appellants' reply brief answered: "[Appellee's] reliance upon the *single unusually brutal beating concept,* as espoused in [Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980)] is also not applicable in this instance." (emphasis added) (Response Brief 17).

[2] The second question presented in the Petition for Rehearing En Banc was "(2) whether this Circuit shall be alone among the federal judicial circuits in holding that the requisite 'policy or custom' for predicating municipal liability under 42 U.S.C. § 1983 for official misconduct may be proved solely by inference from an *isolated incident of misconduct.*" (emphasis added) (Pet. for Rehearing 2).

[3] Respondent's Response in Opposition to Appellants' Petition for Rehearing argued as its second main point: "Defendants-Appellants' Argument With Regard to Inferences Drawn From an *Isolated Incident Of Unconstitutional Conduct* Is Inapplicable With Regard To This Matter". (emphasis added).

Court of Appeals.[4] Thus, it would seem more apropos to consider Respondent's argument under this Court's rule in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257, 101 S.Ct. 2748, 2754-2755, 69 L.Ed.2d 616 (1981), where the defendant municipality in a 42 U.S.C. § 1983 action failed to timely object under Rule 51 to the punitive damages instruction it challenged in this Court:

> "[the] question is important and appears likely to recur in § 1983 litigation against municipalities. And here the question was squarely presented and decided on a complete trial record by the court of first resort, was argued by both sides to the Court of Appeals, and has been fully briefed before this Court. In light of all these factors, we conclude that restricting our review . . . would serve neither to promote the interests of justice nor to advance efficient judicial administration. We therefore turn to the merits of petitioner's claim."

III. Additional Authority For Granting The Writ Since The Petition For A Writ Of Certiorari Was Filed.

Apropos to the importance and recurrence of the isolated incident rule in keeping § 1983 litigation within the bounds established by this Court, the Petitioners respectfully direct the Court's attention to its recent disposition of *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984) *vacated and remanded sub. nom City of Lawton v. Lusby*, 54 U.S.L.W. 3190 & 3221 (U.S. Oct. 8, 1985) (No.

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[4] The Court of Appeals' Order Denying our Petition for Rehearing En Banc, set out in the Appendix to our Petition (App. 21a) recites: "The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case as amended below."

84-1715), which presented the questions (1) whether a single or isolated incident of misconduct will suffice to establish a municipality's liability under 42 U.S.C. § 1983 on an "official policy", and (2) whether an appellate court's affirming a municipality's liability on the *court's* finding an official policy of failing to investigate comports with the liability standards established in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated both in this Reply and in our Petition for a Writ of Certiorari, the Petitioners respectfully request this Court to issue its writ of certiorari to the Court of Appeals for the Sixth Circuit and thereupon reverse the judgment entered herein, or alternatively, summarily vacate the judgment and remand this case for reconsideration under the principles affirmed in *Oklahoma City v. Tuttle*.

Respectfully submitted,

JOHN D. O'HAIR
Wayne County Corporation Counsel

GLEN HOWARD DOWNS
Assistant Corporation Counsel
701 City-County Building
Detroit, Michigan 48226
Phone: (313) 224-5030

Counsel for Petitioners

Dated November 6, 1985.